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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 706

C. FRANK SMITH,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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STATE OF TENNESSEE,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner, C. Frank Smith, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee made in this cause, in which that Court affirmed a judgment of conviction for uttering a forged paper imposed upon him in the Criminal Court for the State of Tennessee in Washington County at Jonesboro, Tennessee.

REFERENCE TO OPINIONS BELOW

The opinions in this case have not been published in book or bound form. There are no unofficial reports published of that opinion. The opinions of the Court are from the files of the Court and appear in the record as follows:

Opinion of the Supreme Court of Tennessee, dated July 14, 1967, appears in this record, Volume III, page 60, et seq., and in the Appendix to this petition.

STATEMENTS OF JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked on grounds that Constitutional rights have been refused recognition by the Supreme Court of the State of Tennessee and in the proceedings which they were reviewing. This jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Can the Supreme Court of Tennessee, relying on Tennessee Code Annotated, Section 27-117, (a) admit that incompetent and inadmissible evidence was allowed to go to the jury at the trial on a disputed and material point of fact and then (b) ignore the effect of that evidence on the jury by saying that there was other evidence in the record? See *Opinion, Appendix*, Vol. III, pp. 60, 65-66.

Petitioner answers: No.

This application of the Tennessee "substantial error" rule denied Petitioner his right to a trial by jury. See *U. S. Const. Amends. 14 and 6; Washington* v. *Texas*, ... U.S. ....., 18 L. Ed. 2d 1019 (1967).

If a fact is controverted, it is for the jury to decide. The record is tainted by incompetent evidence. The jury, weighing that record, held against the Defendant. The Tennessee Supreme Court cannot be allowed to say that the jury would, could, might, or should hold the same way even if the incompetent evidence were not present. This substitutes the Court's judgment on the facts for that of the jury, and thereby denies the Defendant a trial by jury.

2. Can the same trial judge who presided at a previous trial, the results of which were set aside for denial of Due Process there, preside as trial judge at the retrial of the same matter? See *Opinion, Appendix,* Vol. III, pages 60, 63.

Petitioner answers: No.

The reuse of the same judge brings into the second trial a judge (1) with knowledge of the facts as previously presented, and (2) an opinion on the question of guilt as evidenced by his review on motion the results of the previous trial, and denied Petitioner a fair trial with an unbiased judge to act as the "Thirteenth juror." See *U. S. Const. Amends. 14, 5 and 6; Washington* v. *Texas,* ..... U.S. ....., 18 L. Ed. 2d 1019 (1967).

3. Can Petitioner be forced to trial four years after indictment where the intervening delay was not by his consent but occasioned by a prior conviction having been set aside for misconduct on the part of the State in denying him due process? See *Opinion, Appendix,* Vol. III, pages 60, 63.

Petitioner answers: No.

A four year delay is a denial of a speedy trial, yet this delay was not on Petitioner's consent nor due to any fault in him. He had the intolerable task of seeking to defend against a stale claim. See *U. S. Const. Amends. 14, 5 and 6.* The facts of this case make retrial unjust and distinguish it, in diverse ways, from earlier case. Cf. *U. S.* v. *Ball,* 163 U.S. 662 (1896); *U. S.* v. *Tatio,* 337 U.S. 463 (1964); *U. S.* v. *Ewell,* 383 U.S. 116 (1966).

4. Can a Defendant be put to the task of attempting to prepare for trial on seven stale indictments, set on three successive days of one trial term? See *Opinion, Appendix,* Vol. III, pp. 60, 64.

Petitioner answers: No.

The State has no right by trick, either open or covert, to interfere with a Defendant's free and full preparation for defense. The pyramiding of charges and massing of trial dates is such a trick as to oppress a Defendant. See *U. S. Const. Amends. 14, 5 and 6.*

STATEMENT OF THE CASE

In May, 1962, Petitioner was charged under seven different indictments with offenses alleged to have arisen out of a prior subsisting business relationship. In September, 1962, he was tried and convicted on four of them, but under such circumstances, that, after appeals, after State proceedings in Habeas Corpus, after petition to this Court, and after petition for Habeas Corpus to the United States District Court, Eastern District of Tennessee, Northeastern Division, all four convictions were set aside.

The State then caused *all seven* old indictments to be set for trial at the September, 1966, term on three specified, consecutive days. Despite appropriate motions and objections, Defendant was brought to trial on two of the seven indictments and only thereafter advised that the other five would not be heard.

The same Judge presided at these trials as in the past trials.

Only one conviction is existent and is the subject of these proceedings.

In this trial, the Trial Judge allowed three witnesses for the State to write the name in question and exhibit this manufactured evidence directly to the jury, without opinion of any expert, all contrary to the State rules appertaining. This evidence was incompetent as the Tennessee Supreme Court later stated. One material issue was whether a purported document was forged, or not, or by whom.

All points were brought to the attention of the Trial Court, and the Supreme Court, and considered by them, by Motion for New Trial and Appeal. From adverse rulings on the Constitutional points, this writ is sought.

ARGUMENT AND REASONS FOR ALLOWANCE OF WRIT

Question No. 1 is in the line of *Washington* v. *Texas*, ... U.S. ....., 18 L. Ed. 2d 1019 (1967), where some peculiar State custom or rule demands analysis as to its inherent fairness. The circular logic of the "substantial error" rules is sharply revealed in the facts and the opinion in this case. Evidence of admitted incompetency is shrugged off with the statement that there was other evidence on the same controverted issue. Yet the jury has never weighed that evidence without the extraneous and invidious material in the way.

The other questions are all of great moment and importance in the area of procedure subsequent to the award of relief in Habeas Corpus or post conviction procedure. If there are to be retrials, when, how, and by whom shall they be held?

Question No. 4 raises the further problem of how far can the State manipulate procedure to strong arm or overwhelm a Defendant.

These are all questions demanding answers in the present state of the law under the Constitution in the field of criminal procedure.

CONCLUSION

Petitioner is entitled to the relief he seeks.

Respectfully submitted,

BERNARD H. CANTOR
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126 Spring Street
Johnson City, Tennessee
Counsel for Petitioner

APPENDIX A

C. FRANK SMITH,
Plaintiff-in-error,
vs.
STATE OF TENNESSEE,
Defendant-in-error.

WASHINGTON CRIMINAL
HONORABLE ORIS D. HYDER,
JUDGE.

For Plaintiff-in-error: Bernard H. Cantor, Johnson City, Tennessee.

For Defendant-in-error: George F. McCanless, Attorney General, Thomas E. Fox, Assistant Attorney General, Lewis W. May, District Attorney General, Mountain City, Tennessee.

Opinion

(Filed July 14, 1967.)

The plaintiff-in-error, C. Frank Smith, hereinafter called the defendant, was convicted of fraudulently passing and transferring to another a forged paper, knowing it to be forged. He was sentenced to confinement in the State Penitentiary for a term of not more nor less than three years.

Defendant filed a motion for a new trial which was overruled. He has perfected an appeal to this Court and assigned errors.

Defendant was an independent dealer for the John Deere Company. His franchise was in Johnson City and adjacent territory. He was engaged in the sale of John Deere tractors and other farm equipment.

Defendant made conditional sales of the tractors and other equipment. The John Deere Company would purchase some of the conditional sales contracts. The contracts were transferred to John Deere Company by assignments of Smith. On occasions, local banks would purchase conditional sales contracts from defendant.

Roy Scalf, on February 2, 1961, purchased a TD9 International crawler tractor, 1956 Model, from defendant. He made a down payment and executed a conditional sales contract for the time balance of $7961.23. This contract was purchased or financed through the First Peoples Bank of Johnson City. Scalf made his payments to the Bank.

The John Deere Company also purchased from defendant a conditional sales contract for the same tractor with the name of Roy Scalf signed thereon as the purchaser for the same consideration.

Scalf testified he did not execute the latter contract and his name thereon was a forgery.

His two sons testified neither of them signed their father's name to this contract.

It is shown in the record defendant made one payment on the contract assigned to the John Deere Company.

A short while after the John Deere Company purchased the alleged forged contract, Scalf received from the John Deere Company a notice the Company had purchased the contract and a book to keep a record of his payments on the contract to the John Deere Company.

Scalf inquired of defendant how the John Deere Company had come into possession of the contract. Defendant replied he would correct the matter.

Representatives of the Company had a conference with defendant in the office of the Company's Attorney in John-

son City and told him they had been advised Scalf's name had been forged to the contract. He told them Scalf or one of his sons had signed the contract. His testimony in this respect was the same at the trial.

Several witnesses testified defendant enjoyed a good reputation for truth and veracity; and that he was entitled full faith and credit under oath in a court of justice.

Defendant insists that he was denied a speedy trial. The record shows the indictment in the case was returned in May, 1962; and that defendant was tried and convicted in September, 1962. He thereafter filed a petition for the writ of habeas corpus in the Federal Court which was granted in February, 1966. The order granting the writ stated unless the defendant was tried at the next term of the trial court, May, 1966, defendant would be released

On March 29, 1966, the trial judge ordered the case set for trial on May 23, 1966. Defendant resisted this order by motion for a continuance.

In the case of Stubbs vs. State, 216 Tenn., 567, 393 S. W. (2d) 150 (1966), this Court held the fact Stubbs was not tried the second time until more than ten years after he was indicted was not a violation of his constitutional right to a speedy trial where it appeared he had been tried shortly after he was indicted, convicted and remained in the State Penitentiary until the Federal Court held the judgment in the first trial void.

It is next insisted the trial judge should have recused himself because he had presided at defendant's original trial.

We have no constitutional provision or statute which prohibits or renders a judge incompetent to retry a criminal case on the reversal of his judgment by a higher court. King vs. State, 216 Tenn., 215, 391 S. W. (2d) 637 (1965).

It is insisted defendant was denied due process because the District Attorney General informed defendant's Counsel he intended to try all seven cases pending against defendant and the trial judge, with this knowledge, refused defendant a continuance.

It appears from the record Counsel wrote the District Attorney General and asked him whether he intended to retry defendant and if so, in what cases. The District Attorney General replied he intended to try all seven cases. The instant case was set for trial on May 23, 1966, by order of the trial judge on March 29, 1966.

The record further reveals Counsel was employed by defendant on February 2, 1966.

On May 12, 1966, Counsel executed an affidavit in support of defendant's motion for a continuance in which Counsel stated he had been unable to obtain the record from the John Deere Company of all the transactions between that Company and defendant; it being the insistence of Counsel, the records would show defendant had paid the claim evidenced by the alleged forged conditional sales contract.

A continuance is a matter of discretion in the trial judge and this Court will not reverse unless it clearly appears there has been an abuse of his discretion.

The fact defendant may have been able to show he had reimbursed the John Deere Company in toto would not be a defense to forgery or uttering a forged instrument.

Moreover, the Federal District Court ordered the case tried at the next term, May, 1966, of the trial court.

Under the facts, we cannot say the trial judge abused his discretion in denying the continuance.

Defendant contends it was error for the trial judge to admit the statements made by defendant to the representatives of the John Deere Company to the effect Scalf or one of his sons signed the conditional sales contract. It is argued he was not advised of his constitutional right to Counsel and to remain silent. These statements were not made when the defendant was in the custody of an officer. He had not been charged with a crime at the time. He testified at the trial Scalf or one of his sons signed the contract.

During the trial, Scalf and his two sons were permitted to write their signatures on sheets of paper which were handed to the jury for comparison with the signature on the contract. This is assigned as error on the theory it amounted to an experiment before the jury.

T. C. A. Section 24-708 authorizes a comparison by experts of the disputed signature with what are deemed by the trial judge to be the genuine signatures or writings of the apparent signer of the disputed paper, for the purpose of either proving or disproving its execution by him. Powers vs. McKenzie, 90 Tenn., 167, 16 S. W. 559 (1891); Omohundro vs. State, 172 Tenn., 48, 109 S. W. (2d) 1159 (1937). Thus, it was error for the trial judge to permit the jury to compare the signatures made by Scalf and his sons during the trial.

> "The plain intent and purpose of the Act is to permit an expert witness to make comparison between a writing or signature 'proved to the satisfaction of the judge to be genuine' and writings in dispute." Omohundro vs. State, supra.

This Court in Franklin vs. Franklin, 90 Tenn., 44, 16 S. W. 557 (1891), said: "Comparison of handwriting by experts was at common law inadmissible." Referring to the statute, the Court said: "This Act opens the door to

the admission of a class of evidence of very slight value. It is in derogation of common law, and should be strictly construed."

T. C. A. Section 27-117 forbids us to reverse for the erroneous admission of evidence where the record contains sufficient competent evidence to establish the point of fact in question.

Since there is sufficient and convincing competent evidence in the record of the guilt of defendant, we think the action of the trial judge in permitting Scalf and his sons to write their signatures and the District Attorney General to hand them to the jury for comparison was harmless error. In other words, it does not affirmatively appear the introduction of this evidence affected the result of the trial. Butler vs. State, 185 Tenn., 686, 207 S. W. (2d) 584 (1948).

Defendant complains of the action of the trial judge in refusing to permit defendant to prove all the receipts and accounts between him and the John Deere Company. The purpose of which was to show the indebtedness under the alleged forged contract had been paid to the John Deere Company.

We think this insistence is without merit. The only question before the Court was whether the defendant forged the contract or knowingly passed a forged paper with intent to defraud. Evidence of defendant's repayment of the indebtedness nor the manner in which the accounts between defendant and the John Deere Company were kept would be material.

It is not necessary to show any one has been actually defrauded or injured by a forged paper. Girdley vs. State, 161 Tenn., 177, 29 S. W. (2d) 255 (1930).

Defendant insists the court failed to charge the jury the elements of forgery and uttering a forged instrument of knowledge and fraudulent intent.

The trial judge quoted verbatim the statutes defining forgery and uttering a forged paper. He also very clearly defined fraudulent intent. For these reasons, we think this assignment is without merit.

It is insisted by defendant the trial judge should have granted defendant's motion for a new trial on newly discovered evidence. In support of this ground of the motion for a new trial defendant offered his affidavit and those of Yates, Barnette, N. C. Busse, O. A. Smith, a brother of defendant, and John Campbell. These affidavits contradict the testimony of Scalf to the effect he did not go to Knoxville with the defendant to see the TD9 tractor prior to purchasing it.

O. A. Smith testified at the trial the defendant and Scalf came to Knoxville to see the tractor and he sold the tractor to defendant with the understanding Scalf would purchase the tractor from defendant.

Barnette was at the trial on May 23, 1966, but was not called as a witness.

Busse and Campbell by their affidavits merely corroborate the testimony of defendant and his brother that Scalf came to Knoxville to see the tractor.

Scalf in his testimony denied he went to Knoxville to see the tractor before purchasing it from defendant.

This assignment must be overruled for the reason the evidence is cumulative to that of the defendant and his brother and the motion is not supported by affidavits showing diligence on the part of the defendant and his Counsel. Ivy vs. State, 197 Tenn., 650, 277 S. W. (2d) 363 (1955); Ross vs. State, 130 Tenn., 387, 170 S. W. 1026 (1914).

Moreover, defendant nor his Counsel undertook to explain why the affiant, Barnette, was not called to testify.

Lastly, it is insisted the evidence preponderates against the verdict of the jury and in favor of the innocence of the defendant.

In considering this assignment we do so under the well established rule this Court will not reverse a conviction in a criminal case on the facts unless it is shown the evidence preponderates against the verdict and in favor of the innocence of the accused. The verdict of the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State. Such verdict also removes the presumption of innocence of the accused and raises a presumption of guilt and puts upon him, here, the burden of showing the evidence preponderates against the verdict and in favor of his innocence. McBee vs. State, 213 Tenn., 15, 372 S. W. (2d) 173 (1963).

From the evidence, we think the jury could have reasonably concluded beyond a reasonable doubt that after Scalf purchased the tractor and financed it through a local Bank, defendant knew Scalf's name had been forged to the contract which he assigned to the John Deere Company with the intent to defraud. A few days after he assigned the contract to the John Deere Company he made a payment to the John Deere Company. Thereafter, Scalf advised defendant he had received a book from the John Deere Company for the purpose of recording his payments. Defendant assured Scalf he would correct this matter. To the contrary, he told the representatives of the John Deere Company the signature on the contract was Scalf's or one of his sons signed their father's name. His failure to correct the matter after it was called to his attention indicates an intent to defraud.

The elements of uttering a forged instrument are actual knowledge the instrument is false, representation, either

direct or implied the instrument is genuine, and intent to defraud. Wofford vs. State, 210 Tenn., 267, 358 S. W. (2d) 202 (1962).

We are unable to say that the evidence preponderates against the verdict of the jury and in favor of the innocence of the accused. The judgment of the trial court is affirmed.

/s/ Chester C. Chattin
Chester C. Chattin
Justice

Burnett, C. J.,
Dyer, Creson and
Humphreys, JJ., Concur.

APPENDIX B

United States Constitution, Amendment 14:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; or nor deny any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment 5:

> "No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses in his favor, and to have the assistance of counsel for his defense."

APPENDIX C

Tennessee Code Annotated, Section 27-117:

"Technical Errors Affecting Result.—No verdict or judgment shall be set aside or new trial granted by any appellate court, in any civil or criminal cause, on the ground of error in the charge of the judge to the jury, or on account of improper admission or rejection of evidence, or for error in acting on any pleading, demurrer, or indictment, or for any error in any procedure in the cause, unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial."

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IN THE

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner, C. Frank Smith, supplements his petition heretofore filed to refer to and bring to the Court's attention the appliçability of a recent decision of this Court in *Chapman* v. *California*, decided February 20, 1967, 17 L. ed. 705, in which this Court considered the "harmless error" rule in a way that should dispose of the instant case favorably to the Petitioner.

Reference is especially made to the language of the opinion by Mr. Justice Black in section III of the opinion (17 L. ed. at p. 710) wherein he refers to the mischievous results of persuasive but forbidden evidence. Since the

right to a trial by jury is a constitutional right, any probative evidence on a disputed and material issue "might have contributed to the conviction."

The Tennessee Supreme Court did not even weigh the other evidence in the case beyond saying that "there is sufficient and convincing evidence in the record of the guilt of defendant." See Appendix p. A6.

This is not the test required by the Chapman case. The effect of this is to take away from the jury the decision of the evidence, for it could well have been that without the purported evidence of forgery the jury might have believed the testimony of the Defendant that the instrument was not and was not to his knowledge at the time a forgery.

Wherefore Petitioner renews the prayer for relief as in his original petition set forth.

Respectfully submitted,

BERNARD H. CANTOR
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126 Spring Street
Johnson City, Tennessee
Counsel for Petitioner

SUPREME COURT, U. S.

706

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IN THE

SUPREME COURT OF THE UNITED STATES.

C. FRANK SMITH,
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REPLY TO PETITION FOR WRIT OF CERTIORARI.

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St. Louis Law Printing Co., Inc., 413-15 N. Eighth St., 63101. CEntral 1-4671

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IN THE

SUPREME COURT OF THE UNITED STATES.

C. FRANK SMITH,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI.

The petitioner, C. Frank Smith, seeks by writ of certiorari to have this Court review the judgment of the Supreme Court of Tennessee affirming his conviction for fraudulently passing and transferring to another a forged paper knowing it to be forged, and for which he was sentenced to serve a term of not less than three nor more than three years in the State penitentiary.

JURISDICTION.

Counsel for the State of Tennessee admits the jurisdiction of this Honorable Court to review the opinion of the Tennessee Supreme Court.

QUESTIONS PRESENTED.

Five questions have been raised in the petition for consideration by this Court. The issues raised by these questions are in substance as follows: (1) Whether or not

Section 27-117, Tennessee Code Annotated, known as the "Harmless Error Statute" in Tennessee may be relied upon to affirm a conviction in a case wherein evidence admitted to be inadmissible was presented to the jury; (2) Whether or not the petitioner was denied due process of law because the trial judge who sat during the criminal proceeding had sat in a previous similar criminal proceeding for a trial in which the petitioner was the defendant; (3) Whether or not the petitioner was denied due process because of being forced to trial four years after the indictment brought about because of his prior convictions for other offenses having been set aside; and (4) Whether or not the petitioner could be required to stand trial on "seven stale indictments" set on three successive days of one trial term.

STATEMENT OF THE EVIDENCE.

The petitioner was an independent dealer for the John Deere Company engaged in the sale of tractors and other farm equipment. When he made a conditional sale of tractors or other equipment, the John Deere Company would purchase some of the contracts and others were financed through local leading institutions.

Roy Scalf bought several pieces of equipment from the petitioner. The purchase about which this prosecution is involved was that of a TD9 International crawler tractor, 1956 model, on which there was a time balance including carrying charges in the amount of $7,961.23. This contract was financed through the First Peoples Bank, apparently of Johnson City, Tennessee.

This same tractor was also financed with the John Deere Tractor Company. It had the name of Roy Scalf signed as the purchaser, but Roy Scalf denied signing the instrument. The petitioner in a conference with John Deere Tractor Company representatives about a year before the

indictment, when questioned about this purchase, stated that either Roy Scalf or one of his sons signed it, and he still indicated this to be true as a witness in his own behalf during the trial. The company records indicate that one payment was made by Smith Tractor Company to the John Deere Company on the indebtedness in question. (The sale was made February 2, 1961, and the payment was made February 6, 1961.) Two of Roy Scalf's sons testified and denied signing the instrument.

As an independent dealer, equipment was delivered to the petitioner for sale to customers. When it was shipped to him, he had fifteen months to settle for it or return the equipment. If the equipment was sold to a consumer, the petitioner had ten days to settle for it. Customers could purchase on conditional sales contracts and the John Deere Company would accept conditional sales contracts in lieu of cash, which were endorsed over to the company by the dealer, and that is what happened with respect to this purchase, except the name of the purchaser, Roy Scalf, was forged.

ARGUMENT.

(1) It is insisted by counsel for the petitioner that since the Supreme Court stated in its opinion that certain evidence admitted in a criminal proceeding against the petitioner was erroneously presented to the jury, the Court could not say the evidence was harmless or did not affect the verdict. If this is not a proper place to apply such a rule authorized by Section 27-117, Tennessee Code Annotated, it is submitted there would never be a place for such a rule but such is not the case. The Tennessee Supreme Court has applied the rule in numerous criminal cases and civil cases saying that the statute should be invoked only where the appellate court can look to the merits of the controversy and determine that it did not affect the verdict of the jury. **Butler v. State**, 185 Tenn. 686; **Oman Construction Company v. Tennessee Central Railway Company**, 212 Tenn. 556; **McBee v. State**, 213 Tenn. 15.

This Honorable Court even with respect to errors affecting constitutional rights has applied the harmless error rule recently in the cases of **Giles et al. v. State of Maryland**, 372 U. S. 767, 87 S. Ct. 793, 17 L. Ed. 2d 737; **Chapman v. State of California**, 383 U. S. 956, 87 S. Ct. 824, 827, 17 L. Ed. 2d 705, 709. In the **Chapman** case it was said:

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not resulting in the automatic reversal of the conviction."

(2) The petitioner insists that he was denied due process of law because the judge who sat during the

criminal proceeding had sat as judge in a criminal proceeding wherein the petitioner was convicted for a similar offense and one of a series of seven instances in which the petitioner had obtained money fraudulently in connection with his business as a John Deere tractor and farm equipment dealer. It has not been found that the Tennessee Supreme Court has passed on this identical question before. The Tennessee Court of Civil Appeals in **Talley v. Talley**, 51 Tenn. App. 622, has decided the question contrary to the petitioner's insistence and this has been true in a number of other jurisdictions as indicated in the Decennial Digest under the topic of Judges, Key No. 47 (2). Among these cases are: **Sawyer v. State**, 119 P. 2d 256; **Walker v. State**, 84 S. W. 2d 383; **Board of Medical Examiners v. Steward**, 102 A. 2d 248; **State v. Neil**, 419 P. 2d 388; **Sinahopoulos v. Villa**, 224 A. 2d 140. This question has been annotated in 57 L. Ed. 1003.

(3) The petitioner insists that he was denied a speedy trial. The indictment was returned in 1962 and the trial resulting in his present conviction was held in 1966. The term "speedy trial" has almost been universally held to be a relative one depending upon the circumstances in each particular case. **United States v. Alagia**, 17 F. R. D. 15, **Sawyer v. State of Wisconsin**, 63 N. W. 2d (Wis.) 749, certiorari denied, 75 S. Ct. 80, 348 U. S. 890, 99 L. Ed. .... To determine whether or not a defendant has been denied a speedy trial, one rule seems to have been applied in all jurisdictions with one or two exceptions and that is, the right is a personal one and one that the defendant waives unless he requests a trial on charges made against him. The following excerpt from the **Alagia** case, supra, at Page 17, sums the matter up as follows:

> ". . . the Court's adoption of the following language of Worthington v. U. S., 7 Cir., 1924, 1 F. 2d 154, certiorari denied, 1924, 266 U. S. 626, 45 S. Ct.

125, 69 L. Ed. 475, is significant. 'The record fails to show a single effort made by defendant * * * to avail himself of a speedy trial. No facts were pleaded bringing the case within the rule requiring a speedy trial; i. e., that the defendant was incarcerated, or, being enlarged, had appeared in open court demanding trial, or otherwise. Defendant's sole reliance was upon the bare fact that the case had not been prosecuted. If the defendant desired a speedy trial, it was his duty to ask for it, and we must assume that it would have been granted, had he made any effort to procure it. His long and uninterrupted acquiescence in the delay bars his right to complain' [168 F. 2d 891]."

It is interesting to note that the delay in the **Alagia** case was approximately three years, and in the **Sawyer** case, the delay was approximately two years. In the latter case, the Court, at Page 751 of the opinion quoted the following from 22 CJS, Criminal Law, Section 469, Pages 719-720:

"Where there is some authority to the contrary, the general rule is that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial must be made by accused to entitle him to a discharge on the ground of delay, at least when accused has been admitted to bail, or is not within the custody of the court."

(4) The petitioner also insists that he was denied due process of law because the District Attorney General would not inform him which of seven indictments he would have to stand trial, and petitioner did not have sufficient time to prepare for all of them. The first answer to this contention is that these offenses were so similar and a part of the same scheme to defraud the John Deere Company by the petitioner that evidence of the other six would

have been admissible on the trial of the particular case under consideration to show lack of mistake. **Mays v. State,** 145 Tenn. 118.

The second answer is that the petitioner might have been tried on all of these cases at one time. See **Bullard v. State,** 208 Tenn. 641, quoting with approval from **McElroy v. United States,** 164 U. S. 76, 81, 17 S. Ct. 31, 33, 41 L. Ed. 355, 357, as follows:

> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same, and where the offenses are in nowise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them."

Ordinarily, in cases where the defendant is tried on a series of similar offenses closely connected, the State is not required to elect which particular offense it will stand upon until the evidence is presented. **Jamison v. State,** 117 Tenn. 58.

It is difficult to understand the petitioner saying that he did not have an opportunity to prepare for these cases since they and the others growing out of the same circumstances had been in litigation for a period of about four years. It also seems somewhat at variance the petitioner's not being granted a speedy trial and at the same time asking for a continuance.

CONCLUSION.

In view of the foregoing, counsel for the Respondent, State of Tennessee, insists that the petition for writ of certiorari in this cause should be dismissed.

Respectfully submitted,

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Certification.

I hereby certify that a copy of this Reply to Petition for Writ of Certiorari has been forwarded to the Honorable Bernard H. Cantor, Attorney at Law, 126 Spring Street, Johnson City, Tennessee, on this the 19 day of October, 1967.

Thomas E. Fox,
Deputy Attorney General.